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**Market Forces and Fair Institutions:
The Political Economy of Europe
and the U.S. Reconsidered**

by

Jacques Mistral

Conseil d'Analyse Economique, Paris

Senior Fellow, Kennedy School of Government, Harvard University

Jacques.Mistral@dgtpe.fr

Abstract

The paper introduces a new perspective in the vast literature devoted to the political economy of Europe and the U.S. American preferences for a liberal market economy are relatively clear; by contrast, European preferences for a social market economy remain confusing and are the subject of continuing debates in the field of political economy in positive as well as normative terms. Redistribution is the most usual way to deal with different attitudes towards inequalities in the two continents. But redistribution is not the most appropriate summary of what the “welfare state” in Europe actually does: social insurance mechanisms are a more appropriate reference. These deep and persistent differences between Europe and the U.S. are well interpreted in many historical and political aspects. A more theoretical perspective is developed here in five steps. First, those goods (health, pension, education...) with which the welfare state is concerned have powerful inter-temporal properties so that market solutions are not unequivocally optimal. Second, those goods have a strong impact on equality and modern political philosophy clarifies why their production and distribution should reflect considerations of justice as well as of efficiency. A two-step decision process is subsequently introduced: actual choices are the consumer’s job (utility maximization) but embedding fairness in redistributive policies or within institutions providing universal insurance lies in the citizens’ hands. Fourth, this choice between pure or mixed market solutions is referred to two models of political philosophies differently combining Liberty and Equality in the western philosophical tradition. Finally, some elements of the legal system are introduced as a natural bridge between the abstract formulations of collective preferences and actual social institutions.

Introduction¹

America and Europe are not only long-term friends and allies, they are close cousins.² Looking at their political economy, they both enjoy high standards of living, they both cherish freedom as the basic value of society, and they both respect the rules of law and democracy.

Major differences nonetheless appear as soon as one looks at social conditions. The functioning of the labor market, the extent of the welfare state, attitudes towards inequalities or the weight of ethnic factors – to mention only a few of them – have been carefully documented and clearly reveal “a world of difference.”³ It has been of constant interest to economists, as well as political scientists, to make these differences measurable and understandable. A quick review of the literature shows the amount of knowledge which has been accumulated in the recent past in this field and the convincing cases which have been made in developing alternatives theories.

The argument I will develop in this paper is, in one sense, basic – at least at first glance. I will start from these differences between the two continents and consider them as expressing different “preferences”: how different are Americans’ and Europeans’ “revealed preferences” regarding the way health services are produced and distributed? What do their different attitudes towards inequalities reveal? Why did they come to “prefer” such different labor market institutions? Finally, why do they expect such different things from public institutions and the market? The question is simple but, as we know, “preferences” is a tricky concept: the paper is devoted to making of it a workable and useful one. Key to this analysis is the way I will introduce fairness considerations.

The paper is part of a larger research program of which it is only the first step. Subsequent steps will be required to explore more precisely: one, the implementation of two different conceptions of fairness into political and legal structures and two, the interactions of these structures or institutions with market constraints. We can expect from this research new insights in three main directions: one, the question of “embedded liberalism”⁴ and its changing patterns over time; two, the future of the welfare state in challenging times on both sides of the Atlantic; and three, the relationship between economic and moral aspects of economic growth which has rightly been restored in its central place in political economy⁵.

The rest of the paper is structured as follows: the first section introduces a slightly original perspective on the comparison of the “welfare states” in America and Europe; in the second part, I document the most relevant differences between the two continents in this regard; I subsequently explain where I stand in the field of political economics. The fourth part focuses on fair-

¹The preparation of this paper has greatly benefited from discussions with and suggestions by A. Alesina, P. Culpepper, E. Glaeser, R. Freeman, C. Fried, J. Frieden, A. Goldhammer, T. Iversen, F. Michelman, and J. Ruggie at Harvard, H. James, P. Krugman, A. Moravcsik, and J. Pontusson at Princeton, and C. Sunstein at the University of Chicago. I especially thank Peter Hall and Andrew Martin for their comments following an invitation to present the paper at a Center for European Studies seminar at Harvard. I gratefully acknowledge the Wiener Center on Social Policies and the Center on Business and Government for hosting me at the Kennedy School of Government during this research.

²C. Patten (2005) is a fascinating introduction to this relationship in recent years.

³This is the subtitle of Alberto Alesina and Edward Glaeser’s book (2004), which will frequently be referred to in the following pages.

⁴The term is borrowed from John Ruggie (1982) and remains one of the most expressive ones in this matter.

⁵Benjamin Friedman (2005).

ness and is devoted to introducing the specificities and properties of those goods – inter-temporal goods – which are the main concern of the social state; next, I build on recent achievements in the field of political economics to distinguish between marginal changes within and structural differences between social and political institutions. The next section is an excursion in comparative political philosophy to investigate the foundations of two different conceptions of economic and social fairness. The seventh section refers to legal systems as a valuable expression of different collective preferences. The conclusion briefly summarizes the major findings and explores the next steps for research.

1. “Liberal America vs. Social Europe?”⁶

Over the last twenty years or so, the comparative study of advanced capitalist economies and welfare states has generated a rich and diverse literature. The difference between America – liberal – and Europe – social – seems nothing but evident. Europe is sometimes presented as “U.S.A. plus,”⁷ because of its generous social protection. On the other side, it is too easy to denounce Europe as “U.S.A. minus” due to its lack of flexibility and its enduring underperformance.⁸ Finally, what “Europe” means is not clear at all. No reasonable public debate can emerge from this confusion.⁹ Despite huge efforts, we still need to clarify the issue at stake in such a comparison.

Comparative political economy is based on the idea that advanced capitalist societies differ in limited but meaningful ways. Recent literature offers a number of comparisons and typologies. The basic distinction has been introduced by Peter Katzenstein, distinguishing “liberal,” “statist” and “corporatist” political economies; this typology is based on the organization of interest groups and the role of bureaucrats. Gosta Esping-Andersen (1990) tells the story of three distinct welfare states; he distinguishes “liberal,” “social-democrat” and “conservative” models and emphasizes the role of these differences, rather than autonomous market forces, when moving to a postindustrial system. Goodin *et alii* (1999) present “[T]he real world of welfare states” as a competition where the “social-democrat” model takes the lead, “being uniquely well suited to realise all these social and economic objectives(!).” Huber and Stephens (2001) also develop a carefully documented version of the “power-constellation” theory which adds to the traditional central role of labor and identifies a significant influence of Christian Democratic parties and women’s movements. The present research naturally draws on these contributions (and others which will be more precisely introduced later), but my goal is different in three respects.

First, I do not wish to enrich existing typologies that already encapsulate so many significant aspects of the European patchwork. Typologies should not be seen as tools as rigid as the Mendeleieff classification of elements: putting the Netherlands precisely somewhere between Germany and the UK is not the only way to improve our understanding of the European welfare state. Introducing a lot of countries can divert attention rather than enrich the interpretation. Profusion of data can be misleading if not informed by a solid theoretical model.

⁶This expression figures in the title of Jonas Pontusson (2005).

⁷T.R Reid (2004).

⁸Jens Alber (2006).

⁹Cf. the weak substance of the summit of the European Union summoned on this issue by the British Presidency at Hampton Court in autumn 2005.

Europe is made up of diverse countries with long histories and complex sociopolitical arrangements, and it comes as no surprise that they produced such a rich variety of institutions.¹⁰ Scandinavia, for example, is a fascinating group of countries which has been carefully studied; now, with twenty million people, their population is on a par with Minnesota, Wisconsin and Washington state.¹¹ It could very well be that variance among American states is as high as among European nations;¹² that, for example, makes sense if you consider poverty rates which vary from 12.3 percent in North and South Dakota to 26.3 percent in New York state, as compared with European rates ranging from 2.4 percent in Sweden to 12.5 percent in Spain. Diversity is a natural attribute of a continent.¹³

Different goals clearly require different samples; I turn to clarifying my goal. There seems to be a very large consensus about what the welfare state is all about: it's a matter of redistribution.¹⁴ No one can underestimate the importance of this aspect of the socioeconomic equation. Payments are made, incomes are taxed, and the whole stuff is redistribution. I will nonetheless take a different perspective. In broader, fundamental terms, the welfare state is about fairness. Income redistribution is a tool; the point is that fairness is not reducible to "payments to the poor." Two observations give a better understanding of this question.

Income redistribution seems to be a matter of correcting market excesses. As Benjamin Friedman recently argued, extravagant inequalities fuel, in Durkheim's words, a sense of anomie which endangers the social fabric. Correcting market forces is an appropriate answer when the game is too hard for some or when the result is unwelcome for social or moral reasons. But the issue goes further and could preferably be seen as a way of embedding market forces. Goods like health services, pension systems, labor force or environmental protection are misleadingly treated in the same way as cars, airline tickets, insurance premiums or telephone services. The crucial difference is that present levels of consumption don't disappear into present utility but make strong interpersonal and inter-temporal connections. A short summary is at this stage a clear introduction to further developments (section 4): if you are poor and if you drive your children in a used car, it has no dynamic consequences, but the same is clearly not true when it comes to education or health. As compared with many existing views, I will consequently argue that looking to redistribution as such and treating the set of "goods" as a flat continuum is misleading. Fairness is not only a matter of ex-post redistribution but of ex-ante access to certain goods. For those goods, efficiency is definitely not the only required benchmark; justice is part of the issue; political and moral considerations are of primary importance.

It is thus appropriate to consider the conditions of choice (according to which standards and rules should health services be delivered to the community?) before studying actual choices

¹⁰Richard Freeman (1998) rightly observes that "the institutions and rules of the labor market are among the most country-specific."

¹¹On top of that argument, we can also notice with Tony Judt (2005) that the Scandinavian welfare model not only differs from the rest of Europe, but that each of those states is itself quite different from the others.

¹²Tim Smeeding (2006) emphasized this aspect.

¹³Putnam (2000) produces (in the fourth section of the book) a lot of evidence and comments on social capital, education, and health differences among the fifty states.

¹⁴Persson and Tabellini (2002) devote the first part of their textbook to methodology and the second part to "substantive policy issues" which means: "redistributive policies." I return to their contribution later on.

(how much is spent for health vs. entertainment?).¹⁵ The latter choice is rightly considered to be in the hands of the consumer, but the former is a citizens' task: democratically expressed preferences reflect the extent to which market solutions are trusted in order to rule the production and distribution of those goods.

This paper's goal can now be precisely formulated. If differences between "Liberal" and "Social" capitalist economies are really important and robust, as will be confirmed in the next section, that calls for a fundamental, not an incidental, explanation. This is why the paper has a theoretical as well as an empirical part. The theoretical part deals with feasible conceptions of justice in a market economy: we need to distinguish the foundations, logic and persistence of two plausible socioeconomic regimes within the broad and common framework of a market economy/political democracy. The empirical part is concerned with qualifying what is quintessentially liberal in the American welfare state, what is quintessentially European among the diversity of European nations.

Now, a big preliminary question remains: what should we call "Europe"? With this goal in mind, we would for example like to start with a comparison between the U.S. and the Eurozone or the Union.¹⁶ Unfortunately we still do not have appropriate data for this particular regional configuration; political and social institutions also differ significantly within the Eurozone. I will consequently focus on a limited number of big European economies: France, Germany and the UK. Together, they account for more than 200 million inhabitants, two-thirds of the population of the U.S. But there is more than demography here.

A political economy approach should naturally be based on appropriate political grounds. It is surprising that the literature specifically dealing with the welfare state so rarely treats France and Germany as close companions. To be sure, there were and there are a lot of institutional differences and specificities.¹⁷ Besides, when visiting Texas and Minnesota, it is more than visible that American states can deeply differ in major cultural and institutional aspects without ceasing to be truly "American." That could suggest putting Franco-German differences and similarities under a different light.

France and Germany dramatically changed in the latter half of the last century and these economic and political transformations are part of a common adventure.¹⁸ These two countries

¹⁵This observation has clear consequences about the perception and measurement of poverty; the relatively high level of consumption of durable (used) goods by poor people in industrialized countries, in particular in the U.S., is sometimes viewed as testimony that poverty today is very much different from what it was in the past; severely unequal access to education or health care is described in specialized reports but rarely inserted as a major factor into aggregate measures of poverty.

¹⁶V. Schmidt (2004) introduces the brilliant innovation of a "Regional State."

¹⁷Germany is well identified as was France in the past (classified as "statist"); since its rapid opening up and transformations, France is frequently but unsubstantially qualified as "hybrid." The best analysis of this "Changing France" is offered by Pepper Culpepper, Peter Hall and Bruno Palier (2006); see also P. Culpepper (2006). Philip Gordon and Sophie Meunier (2001) subtly describe the "stealth reforms" that have transformed the country during the last twenty years.

¹⁸Remember that the starting point was the Schuman plan, announced on May 9, 1950, and immediately welcomed by the German government. Tony Judt (2005) quotes Konrad Adenauer as saying that "this plan of the French government has given the relations between the two countries – which threatened to be paralyzed by mistrust – a fresh impetus towards constructive cooperation" (p. 157). Harold James (1989) describes the close relationship between Adenauer and De Gaulle as "an association of German economic strength and French political assertion"; finally,

are frequently seen as the “engine” of European construction. There is probably no other example in history of two nations’ destinies being so strongly intertwined. From the beginning in the 1950s (ECSC and EURATOM) to the launching of the Euro in the 1990s, France and Germany have been sharing in a European project which has conversely deeply transformed their domestic conditions. It is of great interest to measure how much their respective “welfare states,” all considerations due to country-specific attributes, reflect this parallelism.¹⁹ As regards the UK, its presence is more than natural due to its “special” relationship both with the U.S. ... and with the EU.²⁰ Now, I turn to the substance.

2. A World of Difference, Which Difference?

Conventional wisdom has it that market forces have been on the rise during the last two decades, and that is undoubtedly true.²¹ This is evident for the U.S. As regards Europe, the UK is leading these transformations but a simple look at France – the former quintessential example of “state capitalism” – testifies as well to the deep reforms that have been aggressively pursued in Western Europe.²² Even if some steps remain to be taken, on both continents, even if “economic patriotism” or “national strategic interests” episodically recall old rhetoric, there is clearly no question about market forces as determining the day-to-day workings of the economy on both sides of the Atlantic: prices of cars, airlines tickets, telephone services, insurance premiums, not to mention interest and exchange rates, which are now globally determined.

Conventional wisdom goes farther and has it that the welfare state should in the same movement be dramatically eroded.²³ The balance of power is said to have fundamentally shifted towards capital. This redeployment is supposedly driven by the forces of globalization and technological change, whose pressure is inescapable and should push major industrialized economies closer to a common model. One has read this story under different brands,²⁴ one can even endorse it as a normative statement.²⁵ But, entering the twenty-first century, is it really an appropriate summary of actual American and European trajectories?

I will check if recent trends regarding inequalities, access to health services, pension provisions, labor-market institutions or environmental norms are significantly, even if partially, con-

under Mitterrand and Kohl, “a rapprochement with Paris offered a more certain relationship than the instability of the Bonn-Washington relations, ... a way of reconstructing a more assertive style of German politics.”

¹⁹Michel Albert (1992) was one of the first to formalize the proximity of continental capitalisms in Europe under the label “the Rhine model” as distinct from the “Anglo-Saxon” one.

²⁰This sample in some sense reflects the typology of Chris Patten’s book, whose subtitle is: “America, Britain and Europe.”

²¹D. Yergin and J. Stanislaw (1998) remain a vivid introduction to the ongoing “remaking of the modern world.”

²²Vivien Schmidt (2002), Philip Gordon, and Sophie Meunier (2001), and the contributions by Pepper Culpepper, Bob Hancké, and Stewart Wood in Peter Hall and David Soskice (2001).

²³Evelyn Huber and John Stephens (2001) give a very systematic and sober interpretation of the transformation of the welfare states “after the golden age.”

²⁴Bill Emmott (2003) or Martin Wolff (2004) are my favorites in this regard. Going a step further, and concluding in the opposite direction, Ezra Suleiman (2003) fears that “relentless attacks and denigration of the state” and of its professional bureaucracy are a threat to democracy.

²⁵Paul Pierson, ed. (2001) is a good example of this idea that, at the beginning of the twenty-first century, the major issue regarding the welfare state was no longer the question of “retrenchment” but the need to reform and modernize; see also footnote 27; an interesting illustration of this movement to reform and modernize is given in France by R. Fauroux and B. Spitz (2004), to which I contributed (in J. Mistral [2004], “L’Etat-providence en faillite”).

verging between the U.S. and the EU.²⁶ I distinguish in this regard two sets of data, inputs (expenditures, regulations, laws), and outputs (measurable results); emphasis will be put on the fact that, in economic terms, European institutions are better seen as an insurance scheme rather than as redistribution engines.

The welfare state in Europe is under stress for reasons which have been excellently documented.

Its “retrenchment” has provoked a huge literature since the middle of the 1990s. The first phase was focused on the consequences of the Reagan-Thatcher policies (see, for example, P. Pierson [1995]); a second wave extended investigations to other countries and policies and proposed a view where retrenchment appeared pervasive but the basic contour of the welfare state remained intact (see, for example, Huber and Stevens [2001]). Finally, the welfare state clearly remains a dominant feature of western European societies (Table 1). Two sorts of broad measures are available. The size of gross social expenditure, the most trivial indicator, is approximately twice as high in France and Germany (28 percent of GDP) as in the U.S. (14.8 percent), the UK being in the middle (21.4 percent) as it will show in many aspects, not all. Other indicators initially produced by the OECD offer a metric to measure the extent of social protection, both in the labor market and in terms of income. Even with diagnosed weaknesses,²⁷ these statistics are robust and eloquent enough to serve as a good starting point. Ranking industrialized countries on a scale from 0 to 1, the U.S., the UK, France and Germany are respectively at .14, .25, .61, and .86 for the synthetic “employment protection index” calculated by T. Iversen (2005) at .10, .22, .46, and .52 for the “income protection index.” Simply said, the welfare state in continental Europe remains far away from U.S. standards.

TABLE 1: A LOOK AT THE DATA / INPUTS

U.S.	UK	FRANCE	GERMANY
EMPLOYMENT PROTECTION INDEX (SCALE)			
0.14	0.25	0.61	0.86
GROSS PUBLIC SOCIAL EXPENDITURE (% GDP)			
14.8	21.4	28.5	27.4
SOCIAL CONTRIBUTIONS – INCOME TAX (% TOTAL)			
23.3 – 42.3	16.4-30.2	33.9-17.7	37-27.1
REAL FUEL PRICE (US\$ / LITER)			
0.25	0.9	0.8	0.7

Regarding resources, the most important point is that the continental European welfare state does not principally rely on direct taxation properly said. Income taxes represent 17.7 and

²⁶The best synthetic reference here is Peter Lindert (2004) whose main conclusions are: 1) that the spread of democracy has (generally speaking) played a major role in propagating social goals and expenditures; and 2) that financing these expenditures does not prove severely weakening to economic incentives and long-term performance, as frequently asserted, for example, by Tanzi and Schucknecht (2000). I share Lindert’s view, which is exemplified in simple terms by the insufficiently well publicized fact that average growth per capita in France and the U.S. during the last quarter of a century has been ... exactly the same (2 percent p.a.).

²⁷Aggregation procedures (normalization, weighs) are recognized limits of these indexes; they are not available for recent years – but it is reasonable to suppose that the huge divergences that they document have not significantly changed in the most recent period.

27.7 percent of total public resources in France and Germany as compared with 30.2 and 42.3 percent in the UK and the U.S. More generally, it has frequently been observed that direct taxation of households and companies was at a low level in continental Europe: in 2003, taxes on income and profits represented 10.1 and 9.7 percent of GDP in France and Germany; they peak at 13.0 and 11.1 percent in the UK and the U.S. (after a dramatic reduction in this country, from 15 percent in the 1990s). we will come back to this issue later when comparing different logics for the welfare state.

Briefly said, there has been little retreat in the welfare state's intervention in continental Europe,²⁸ high public expenditures and powerful institutions remain in the early twenty-first century a clear testimony to the reality of "embedded capitalism." After describing the "inputs," I now turn to their results, the output of the social state (Table 2).

Income inequality differences are among the first and the most striking results. Gini coefficients are at 35.7 and 32.6 for the U.S. and the UK as compared with 27.3 and 27.7 for France and Germany, a difference which has been extensively documented and rationalized in the recent past.²⁹ But, as explained in the first section, the goal of the welfare state cannot be reduced to redistribution *per se*; fair access to a range of economic amenities would be, at least for Europe, a more appropriate mission statement (more on that later). Without pretending to be exhaustive, a few significant trends are possibly more meaningful than differences in income distribution.

Table 2: A LOOK AT THE DATA / OUTPUTS

U.S.	UK	FRANCE	GERMANY
INCOME INEQUALITY (DISP INC. GINI/P90-P10)			
35.7/5.4	32.6/4.2	27.3/3.4	27.7/3.5
Child/Old Age Poverty (%)			
21.7/24.6	16.2/14.4	7.3/10.5	12.8/8.5
HEALTHY LIFE EXP. (YRS) – INFANT MORTALITY (0/00)			
69.3/6.8	70.6/5.3	72.0/4.2	71.8/4.3
NET REPLACEMENT RATE/RETIREMENT (%)			
51	48	69	70
FUEL USE (GJ/CAP.) – CO ₂ EMISSIONS (TONS/CAP)			
52 – 19.7	17 – 8.4	16 – 6.2	19 – 10.2

First, Europeans regard their health system as a major achievement of the social state. A few figures convincingly illuminate why. Healthy life expectancy is at 69.3 years in the U.S., 70.6 in the UK, 72.0 in France and 71.8 in Germany; infant mortality, frequently seen as a summary result of the health production function, is at 6.8 per thousand, 5.3, 4.2 and 4.3 in our four countries. For elderly people, the replacement rate for retirement is at 51 percent in the U.S., 48 percent in the UK, 69 and 70 percent in France and Germany; subsequently, poverty rates for seniors are higher in the Anglo-Saxon countries (24.6 and 14.4 percent) than in the continental

²⁸This cautious conclusion is reinforced in recent studies; see the detailed analysis and balanced comments of Jonas Pontusson (2005); at the extreme, P. Lindert (2005) concludes that "[T]he welfare state is not an endangered species among OECD countries."

²⁹A. Alesina and Ed. Glaeser (2004).

countries (10.5 and 8.5 percent). Labor-market statistics are the usual companion to welfare expenditures; there we find negative results for the continental European countries: unemployment is much higher, periods of unemployment are much longer, jobs created in the service industry fewer. This is a fascinating element in the comparison: more jobs and more poverty in the U.S., higher unemployment and lower poverty in Europe. Following the strong case made by A. Alesina and E. Glaeser, it is now well-known but still striking to observe that, for a majority of Americans, poverty mainly reflects a personal failure, while the poor are mainly considered to be trapped by Europeans. The most recent element in this debate, and one whose meaning is more disturbing as compared with traditional prejudices, is that intergenerational mobility in the U.S., usually considered as a counterweight to larger income inequalities, is no higher in America than in Europe.³⁰

These differences are most frequently described by reference to the extent of redistribution. I see three reasons to explain why redistribution is naturally favored as a methodological tool. First “redistribution” fits well within economic teachings and models: taxes and subsidies are easy to manipulate. Second, the U.S. model of the welfare state (Medicaid, welfare properly said) is relatively well in line with this description (even if Medicare and Social security are important elements on the social insurance side³¹). Third, income distribution is much more equal in Europe, and this seems more than likely to reflect (presupposed) redistributive policies. I nonetheless see a major problem here which has not attracted sufficient attention: this model of the welfare state is simply not well adapted to European policies.

**Table 3 : “VALUE FOR MONEY” (% of GDP)
WELFARE SPENDING vs. SOCIAL INSURANCE**

U.S.	UK	FRANCE	GERMANY
Social Expenditure			
14.8	21.8	28.5	27.4 of which
« Insurance »			
14.1	20.3	25.1	23.7
<i>PENSIONS</i>			
6.1	8.3	11.9	11.2
<i>UNEMPLOYMENT</i>			
1.8	5.9	6.0	4.5
<i>HEALTH</i>			
6.2	6.1	7.2	8.0
« PURE Social Expenditure »			
0.7	1.5	3.4	3.6

The relationship of the middle class to the welfare state is poorly captured by the usual economic model of redistribution. For a typical European family, for example, “taxes” pay for college tuition and social contributions pay for the family’s health expenditures and future pen-

³⁰See J. Ferrie (2005). Jacques Mistrail and Bernard Salzmman (2006) give a detailed assessment of the empirical literature on inequalities, social mobility and the functioning of the labor market in the U.S.; many more empirical references are provided there.

³¹As a matter of fact, Social Security proved again to be the “third rail of American politics,” when the newly re-elected President tried to reform it in 2005.

sion, and that makes a huge difference from the similar American family. Except in the UK, social contributions are not part of the Government budget; they should consequently not be confused with taxes, they are closer to insurance premiums.³² Three arguments substantiate this comparison:

- 1.) These premiums pay, as naively exemplified above, for private consumption and, as with car insurance, the scheme is (roughly speaking) universal: every household pays for receiving a personal service;
- 2.) The amount of the premium is best seen as reflecting a price rationality: covering the cost of the service is the major determinant of the price (and it is far from clear that the excessively decentralized system of the U.S. is administratively more “efficient” than the public centralized ones);
- 3.) In private as well as in public insurance, there is an important element of mutuality, since the service one will receive is not known with certainty.

These elements do not fit with redistributive policies (“tax and spend”); they rather reflect the very logic of the insurance industry. The main specificities of universal social protection in Europe can thus best be summarized by two considerations: 1.) Availability is much greater for health care and pensions; 2.) Pricing actually includes a stronger redistributive element. It seems consequently a wise precaution to move away from a caricature of the European welfare state: to assert that a massive and irresponsible bureaucracy governs the health of French or German citizens, as ideologues sometimes assert, and that this system relies on heavily taxing the rich to pay for the poor, is grossly misleading. This is why we will take the two different forms of the welfare or social state, mainly redistributive policies in the U.S. as against mainly insurance institutions in Europe as the major question in this research. Could this difference reflect differences in the perception of economic and social fairness?



Environmental protection as a social good

It makes sense to add an unexpected guest to this discussion: environmental protection. Oil consumption has nothing to do with the “welfare state” as such, but it is directly linked to the mix of citizens’ concerns in which we are interested when looking to health or retirement or labor protection. Despite its apparent simplicity as a commodity, oil is a good example of a “good” encapsulating much more complexity than other standard consumer goods (see Daniel Yergin [1992]). This example can help in our understanding of other differences in the more institutionalized world of social protection. And it is such a visible difference between Europe and America!

On the “input” side, taxation of gas is a distinctive feature of European countries, even in energy-rich countries. In the good old days, before the recent hike, the price of fuel was as low as twenty-five cents a liter in the U.S. and close to eighty cents a liter in our three European coun-

³²K. Ove Moene and M. Wallerstein (2001) make a similar case and develop a formal model, making explicit the endogenous support for welfare policies enacted as insurance rather than redistributive policies. The same authors (2003) develop a series of reasons why insurance against risks could be higher in countries with lower inequalities.

tries. Turning to the output, I pick up carbon dioxide emissions as the environmental measure of consumers' and citizens' preferences regarding the environment: 19.7 tons per capita in the U.S., 6 in France (nuclear power), 8 in the UK and 10 in Germany (coal and lignite).

This could be seen as an interesting paradox. No one will support the idea that Europeans "love" these taxes, but the high price of gas is fundamentally accepted in Europe because "high tax" is well understood as an incentive for improving fuel efficiency; it is seen as an appropriate solution to the management of an exhaustible resource; and all this is linked to the question of global warming. It doesn't look like as a confiscatory tax; it's rather considered as a shadow price. Couldn't this be considered proper economic reasoning?



This short survey finally adds four conclusions to the existing literature.

First, the idea of converging trends between the U.S. and the EU is not confirmed by the data; they simply illustrate a possible confusion between analytic and normative positions: it is clear that the social state in Europe urgently needs to be reformed; however, it is one thing to recommend reforms, it is another to explain the actual rationale of changes on both sides of the Atlantic, and convergence is not necessarily the winning argument in this regard.

Second, France and Germany³³ present many more common points than are usually seen; these two countries have been the political engine of the European project; on top of that, and despite their initial differences, the social fabric built during the second half of the twentieth century reveals very deep similarities.

Third, it is striking that the European social system, based on universal coverage, is not a kingdom of insiders fighting to preserve their privileges; the result of the social state is certainly built upon a strong influence of well organized labor and political forces but, as the data clearly demonstrate, actual access to social protection in contemporary industrialized economies is much more unequal when it is inspired by the idea of "targeting the needy."^{34,35}

Finally, the form of the "welfare state" is as important as its extent: we want to understand why Europeans preferred designing institutions closer to a sort of non-market insurance industry than to a redistributive scheme. In other words, the question is not about actual choices (more or less redistribution) but rather why one continent offers one set of choices and the other

³³Whether this parallelism should be extended to "continental Europe" remains at that stage an interesting question.

³⁴This is why I will not follow in section 6 the "Political Theory of the Welfare State" developed by Robert Goodin (1988), since he restricts welfare "to relieving distress among the neediest members of the community"; even if he does not object in principle to extending social benefits more widely, there are many broader questions here: are the truly needy a sufficient political force to get traction in the political process? are the means of targeting welfare to this population a source of bureaucratic mismanagement and an obstacle to citizenship? is the truly needy person still a member of the community? or a pariah? These are questions which clearly need further elaboration.

³⁵The American Political Science Association gives in its "Report on Inequality and Democracy" (2004) a possible reason for this situation: "citizens with lower incomes speak with a whisper that is lost on the ears of inattentive officials while the advantaged roar with a clarity that policy-makers readily hear and routinely follow"; the Report fears that "the historic accomplishments of the rights revolution are now threatened by widening economic and political inequalities." This is not far from Benjamin Friedman's remarks on the same issue. See also Martin Gilens (2004).

another set. Now, what is the appropriate theoretical framework for understanding these preferences?

3. Questions for Political Economists

As an economist, I would have liked to get economic explanations for these preferences. Very interesting aspects have been highlighted in recent research after this sort of issue clearly became a renewed center of interest. Olivier Blanchard convincingly described what can be understood as a “preference for leisure” by European workers; he also offered an already classic reference for describing what we know and what we don’t regarding the specificities of the labor market in Europe, finally integrating factors like trust in industrial relations and civic virtues.³⁶ Alesina and La Ferrara, Alesina and Fuchs-Schundeln, or Benabou and Ok, among others, advanced different explanations of attitudes towards redistribution. The main result in this regard is that a “preference for social mobility” in the U.S. (real or supposed) is viewed as a substitute for redistributive policies. In the field of international trade, Pascal Lamy recently described statutory rules (technical standards, safety procedures...) as expression of “national collective preferences.”³⁷ To cope with these issues, generally speaking, pure economic considerations are frequently viewed as not powerful enough;³⁸ other elements are clearly needed. Alesina and Glaeser elegantly refer these differences to different political institutions. Since political institutions in the nineteenth century were everywhere “conservative,” they ask why conservatives in the U.S. have been able to maintain conservative institutions that were dramatically altered in Europe during the twentieth century. They point to a major difference in the ethnic fractionalization of the country, which has constantly been an obstacle to ambitious redistribution policies in the U.S. The chapters devoted to these two aspects are fascinating.

Back to economics. Alesina and Angeletos (2003) build a model describing interactions between social beliefs (another approach of collective preferences) and welfare policies. If a society “believes” that luck, birth or connections determine wealth, it will tax a lot, distorting allocations and making these beliefs self-sustained. If instead the society believes in the virtues of effort, it will choose low redistribution and in equilibrium the role of luck will actually be limited.³⁹ This is a fascinating story, exhibiting multiple equilibria depending on the vision the society has of itself. In this vein, I will precisely explore the foundations of different “beliefs” and how they turned into practical realities. Now, remember that America and Europe do not only differ in the extent of their redistributive policies. The European specificity, if any, goes beyond money transfers; it fundamentally involves the whole organization of major industries. This question is related to the respective roles of the market and the state. We turn to recent major contributions in this field.

We cannot underestimate in this regard the recent contributions of the “Varieties of capitalism” school. Peter Hall and David Soskice (2001) have developed a powerful representation of

³⁶O. Blanchard (2004) (2005).

³⁷Different visions of GMOs in America and Europe exemplify the point; trade negotiations on those obstacles prove much more difficult to conclude than about tariffs: interests invested in “preferences” are frequently more deeply rooted than traditional protectionist claims; see P. Lamy (2005).

³⁸According to Alesina and Glaeser, they leave us “almost completely empty handed.”

³⁹Alesina and Fuchs-Schundeln (2005) propose another example of interaction between individual preferences and past social experiments in comparing the surviving preferences of East Germans for high levels of redistribution and describe their progressive convergence towards the western level.

the differences between “liberal” and “coordinated” market economies; they have built a firm-centered political economy that allows them to go step by step from institutions to behaviors and to strategic interactions between economic actors. This articulation of micro- and macro-determinants of national differences certainly is a model for further research. At the heart of their demonstration is the difference between two education and training systems, based on general education in the U.S. or in the UK, on vocational training in Germany and, in a lesser way, France.

Following the same argument and closer to our own research, Torben Iversen (2005) has demonstrated how these differences in skill systems precisely generate different models of the welfare state. Skills are used as the basis of an asset theory of individual preferences, which establishes a connection among individuals’ preferences, political choices and social institutions. This, again, is a model for those who want to elucidate the interaction of national specificities and external pressures in an era of globalization.

The different organization of the health or pension systems in America⁴⁰ and continental Europe notwithstanding remains a puzzle. Indeed, it can be argued that, after World War II, the American solution of the 1960s and 1970s could have been perfectly adequate to protect the interests of skilled workers and could very much have been implemented in Europe in the follow-up to the Marshall plan. General Motors employees were not so very different in this regard from Volkswagen’s or Renault’s. The fact is that, post-World War II, stronger forces have pushed workers, voters and governments in America and Europe to look actively for very different solutions;⁴¹ these different forces do not seem to have exhausted their influence today.

We have made some progress in identifying useful tools in the recent literature. At its roots, the welfare state is concerned with correcting market forces when income distribution appears inadequate for exogenous reasons (the Musgrave argument). And that opens a wide area for political analysis; the danger here is of this interaction being wrongly presented as politics against markets. A more qualified understanding of the interplay between markets and institutions is consequently needed. “VoC” studies, which are presently the most promising path in this direction, make the economic agents able not only to play the market game but to frame the rules; if considered as strategic agents, workers and companies transform their environment. But the extent and the form of the European welfare state is not reducible to this explicit coordination of market actors.

It is now possible to clarify my position in the field of political economy. Correcting market forces and coordinating market actors are two eminent avenues for understanding the difference between America and Europe; a third way which I will explore now can be described as “circumscribing market solutions.” The crucial difference we have emphasized lies in the extent to which market forces are trusted for delivering those particular goods with which the welfare or the social state are concerned. Different national preferences can shape different institutions that govern the production and circulation of goods in a large part of the economy. Now, what is so specific about those goods which Europeans, at least partially, subtract from market forces?

⁴⁰According to J. Richmond and R. Fein (2005), employer-based insurance – which is a peculiarly American institution – could very well be the result of historical accident rather than of deliberate policy.

⁴¹More on this aspect in section 7.

4. What's the Matter with "Inter-temporal Goods"?

The beauty of the modern theory of value, as exemplified by Debreu's book, lies in its purity. Consider the starting point. The space of goods is $\{i\}$, the space of agents is $\{j\}$, the initial endowments are $\{w_{ij}\}$, no need to elaborate, that's self-sufficient. And that has also been sufficient to fuel innumerable developments. The extraordinary power of the theory lies in its coherence and constructive potential. By the way, with this model, we also inherit a vision of the economy composed of a flat continuum of goods. But what about health? Pensions? Jobs? Global warming? Should we more precisely qualify those goods identified in the previous sections?

Economists have developed a long series of sub-definitions about goods. In pursuit of different goals, they have distinguished commodities, inferior goods, luxury goods, durable goods, capital goods, traded goods, public goods, merit goods and illegal goods, to enumerate only a few of them. These typologies have mainly practical purposes: organizing statistical data, studying behaviors, designing policy recommendations. But recognizing the wide diversity of goods immediately raises important theoretical questions. Suffice it to mention the names of Veblen or Duesenberry – and the persistent relevance⁴² of their contributions – to remember the complexities underlying the very notion of the space of goods as soon as we leave pure market considerations and put behaviors into their social context. Modern political philosophy suggests two major reasons why we have to be more careful with those goods which are deeply involved in the social fabric.

Promoting some sort of egalitarianism is at the core of any normative theory. In purely economic terms, fairness is a matter of redistribution – which means monetary transfers. But normative theories of justice put emphasis on a different approach when considering that certain goods are of central concern: income and wealth naturally, jobs and educational opportunities, health care and retirement and, more fundamentally, autonomy and self-esteem, power and authority. John Rawls certainly played a leading role in opening up this new avenue when introducing the idea of "primary goods," followed by Ronald Dworkin asserting the idea of equal access to resources. Serious difficulties immediately arise, which nourished a huge literature. There is, for example, no canonical list of primary goods, and only the idea of a "list" of primary goods – whose distribution has to be optimized in some sense – directly, raises the question of aggregation.⁴³ I do not engage in this debate and will rely on Miller's appreciation that there is "a movable boundary between justice-relevant and justice-irrelevant goods, the position of the boundary depending partly on the technical capacities of our social institutions and partly on the degree of consensus that can be reached" within this community (more on that later). What we get at that stage is only a pressing invitation to depart from pure monetary/redistributive considerations: when fairness is at stake, what matters is access to certain goods.

Now, taking those goods seriously invites us to go further than initial resources. Adopting a Rawlsian position at best offers, as Amartya Sen pointed out, a truncated approach to egalitarianism. Focusing on the initial distribution of goods (or resources) is important but instrumental. Life is a process, economic life is a "cycle" – as economists frequently assert – so that initial

⁴²Schor (1998).

⁴³John Roemer (1996) categorically asserts that "finding an index (of primary goods) is a problem that Rawls does not solve ... and it is a serious problem, for on it hangs Rawls's claim that his theory is non welfarist"; Marc Fleurbaey (2002) adopts a more nuanced position. More on this in section 5.

conditions, even under the best considered set of initial conditions, are no proper criterion for social justice. Even if there is no easy metric for assessing the different aspects of a good life, you need to refer to what a person does with her initial endowments or goods or resources. Looking for deeper foundations for justice, Amartya Sen introduces capabilities and functionings: you must consider not only availability of resources but the capacity to use them appropriately, not only freedom to choose between different goods, but freedom to build the set of options within which choices will be made. It's no surprise that, when making a rare reference to historical situations in this book, A. K. Sen chooses to comment on the famous Franklin D. Roosevelt speech on the four freedoms. Freedom of choice as a consumer is one thing; more important is freedom to act as an agent.⁴⁴ Anyway, that leads to a focus on how economic life tends to expand or to restrict opportunities beyond preexisting constraints. What we get here is a pressing invitation not to limit our vision to the initial situation understood as a first round when consumers fully make their inter-temporal plans; the entire economic game is not settled at the beginning. Referring to capabilities and functionings rather calls for a vision based on lifetime sequences of risks and opportunities, including permanent interactions with others and future decisions depending from irreversible consequences from the past as well as from unexpected situations and changing horizons.

Without further elaboration here, we recognize that modern political philosophy introduces powerful theoretical arguments to distinguish {i} goods, whose production and distribution is without ambiguity properly ruled by market forces, from {I} goods whose very special feature is to have powerful inter-temporal and inter-personal properties: your future very much depends on what decisions you make today concerning acquiring skills, protecting your health, preparing for your retirement or preserving the environment, and that is naturally truer regarding your children. For these reasons, I will from now on call "IT-goods" those goods for which fairness and efficiency considerations have to be put in balance.

From an economic perspective, connecting today's decisions with their medium-, long- or very-long-term consequences injects a lot of uncertainties into the decision process of any agent and in the supply/demand adjustment of any market. Remember that supply/demand adjustments are at their best when there is a simple metric – a price which summarizes all the needed information for both participants – and it is doubtful that is the case here. Two major considerations actually derive from the inter-temporal nature of IT goods, which clearly explains why designing arrangements to govern their production and distribution is a preliminary issue preempting actual choices.

First, huge difficulties face our standard consumer when preparing his decisions; many of the well-known restrictions facing the study of optimal individual behavior or the proper func-

⁴⁴This is an ideal which is very much present in the American tradition of the "self-supporting man." Michael Sandel (1996) shows how strongly connected in this tradition were the notions of free labor and independent citizens; he interprets the erosion of this tradition in the middle of the nineteenth century and proposes an extremely interesting discussion of how the typical wage earner of big industries – losing his position as a free laborer – had been later restored as another expression of American values; free contract with the employer would finally be substituted to self-employment as proof of an unaffected independence (this discussion can interestingly be connected to what is said in section 7 concerning the role of the Supreme Court in labor contract cases at the end of the nineteenth century, in particular the *Lochner* case). Finally, the expansion of the Keynesian economic policies after World War II is viewed by Michael Sandel as an impoverishment of citizenship and freedom which calls today for a renewed civic virtue.

tioning of competitive markets apply. *Information* is incomplete or costly or difficult to use properly. In this precarious situation, our educated consumer faces nothing but *uncertainties* about future needs on the labor market, future returns on financial assets, future therapies to cope with progressively deteriorating health, future consequences of global warming. As we very well know, commensurability is the prerequisite of any rational theory of choice. If agents do not know the attributes of goods, economics clearly recognizes that we have to devote costly resources to measure and monitor them. In sort of a D. North's tradition, this is a sufficient argument to introduce institutions as necessarily completing market forces and consequently embedding different conceptions of fairness.⁴⁵ Finally, many of these decisions introduce a flow of externalities which is at best poorly reflected in the present parameters of choice. Here is a case for cautiously using the market as a tool to govern these goods.⁴⁶

Second, IT goods have dynamic properties: they not only connect present and future levels of utility or well-being or whatever, they contribute to defining who you will be tomorrow, what you will prefer, most importantly what your opportunities will be. For the different individuals in a community, their life-cycle story is not appropriately represented as a series of curves which you could derive from individual {1} to individual {n} through linear transformations; initial conditions and available choices give better or worse chances to get good jobs, to maintain a healthy way of life, to offer your children a good start, to prepare a gratifying retirement. It is consequently no surprise that IT goods have strong and inevitable retroactions on equality. In those situations where market considerations alone decide your access to IT goods, access will be grossly unequal and, at the bottom of the ladder, your future opportunities will likely be severely reduced.

We have argued that individuals differ as much in their initial endowments as in the subsequent options they face and the way they will be able to react: similar situations will mean opportunities for some, constraints for others.⁴⁷ A suggestive presentation could refer to a production function of anyone's life path: anyone has an initial endowment, faces technical possibilities and his choices supposedly put him on the efficiency frontier. Referring to this parabola, my point here is that the appropriate production function is not a neoclassical one: I would preferably refer to a sort of endogenous theory of individual functionings: the better you start, the best use you make of available choices, the greater the rewards in the struggle for life. . . . And the more the resulting society comes close to a dynastic one where increasing social differentiation is the rule, social mobility the exception.⁴⁸

⁴⁵Properly deciphering the environment is a major prerequisite of the rational choice theory, as H. Simon demonstrated. Subsequently, D. North (1990), the Nobel Prize winner, argued that measurement and enforcement costs are the sources of political, social and economic institutions. There is probably no better example than the healthcare industry in this regard; more generally, IT goods are clearly extremely complex in these two aspects, measurement and enforcement: efficiency, and not only fairness, require institutions *à la North*. See following footnote.

⁴⁶The "mess" of the private healthcare system in the U.S. is not only recognized, (see Richmond and Fein), its huge excessive costs – as compared with foreign countries as established by the GAO – are clearly attributable to the inefficient private structure of the industry. With European eyes, the affection of U.S. society for its health system remains something more ideological than pragmatically informed: this is clearly exemplified by J. Cogan, R. Glenn Hubbard, and D. Kessler (2005)

⁴⁷Jacques Mistral and Bernard Salzman (2006) follow this line to give an interpretation of the flexibility of the U.S. labor market.

⁴⁸Referring to special episodes of economic history could be illuminating in this regard: the Gilded Age, also designated as the age of "robber barons," provides a lot of spectacular stories illustrating this idea of divergent life paths;

In short, IT goods can be the engine of divergent life paths, they are also powerful tools for implementing social fairness; in any case, they are not neutral intermediaries unambiguously delivering a general and fair equilibrium. For this reason, the nation as a whole is strongly interested in controlling these forces, which can endanger any vision of justice. This is clearly a case for introducing fairness considerations not only into individual choices, as altruist motives would suggest, but directly into the very framework of individual choices. This is why we turn now to institutions.

5. Institutions as Embedded Preferences

Taking “Collective Preferences” seriously is a demanding task because this is a particularly suspicious concept: what are “preferences”? How could they be “collective”? Let us start with the second question.

Aggregating individual preferences always bears the burden of original sin since the Arrow theorem. A huge literature developed to bypass the difficulties of aggregating individual preferences. Three of those efforts are valuable benchmarks in this research: 1.) the social welfare function of Harsanyi (1955); 2.) the dual “selfish-altruist” self-invented by Margolis (1982); 3.) the social ordering function of Fleurbaey and its implications for just institutions (2002). Interesting as are these efforts, aggregation of individual preferences as regards this research ends in a deadlock: as discussed earlier, the social European state is not a question of altruism, anything “collective” in the European welfare state does not derive from aggregation.

Preferences as well are recognized as an ambiguous concept. If we speak about choices, we can entirely dispense with this idea. On the other hand, there is the temptation to look to something “deeper” in some sense that lies behind and could explain actual choices.⁴⁹ Attempting to use preferences as an abstract basis for rational self-interest actually proves disappointing. We have every reason to think that preferences are shifting, that they depend on social norms, legal rules and endowments: presupposing given preferences does not help anyway.⁵⁰ Preferences are dependent on a context, that’s why economists retreated to revealed preferences. Should we consequently get rid of collective preferences?

Now, let’s take a different approach: conversely, could the context be dependent on preferences? After all, institutional and legal arrangements are precisely the means a nation uses to reach certain goals. People choose and act in this regard through elections, parliament and government. This is the way eventually to articulate the respective spheres of the market and of public institutions: property rights, competition, and profit rule in the former; a workable conception of equity, a Weberian bureaucracy,⁵¹ and political accountability in the later. But wait a minute: why should we be considering political solutions to essentially economic issues?

It is true that healthcare is nothing less than an industry: it is all about costs, investments, drugs, skills, research, management on the supply side and individual choices on the demand

Hearst Castle in California has possible parallels in Europe (Neuschwanstein, for example); the latter is a political story of the past, the former, a pure product of modern economics.

⁴⁹Cass Sunstein (1997).

⁵⁰Even within a purely welfarist view, one might explore the idea that promoting welfare is not only a matter of satisfying given preferences but is also a matter of promoting certain types of preferences.

⁵¹The reference to Ezra Suleiman (2003) is more than appropriate here.

side. Pensions as well seem to be the quintessentially financial problem of a life-cycle, a matter of financial products and personal responsibility. True enough, but, as emphasized in section 2, there is a choice here between mainly private or public provisions in organizing insurance programs⁵². This is the point where economics and politics interfere, and this has become one of the most active research areas in the last decades; Persson and Tabellini (1998) have offered an outstanding contribution to this field to which I refer now.

Political economics precisely explores questions raised by economic policies in modern democracies: typically, what determines the size and form of redistributive programs or the extent and type of public goods provision. These are seemingly the sort of positive questions I am dealing with in this research, questions about the way policy works, not the way it should work. These models bring analytical clarity into some aspects of the political process (the median voter, the role of special interests...), they also deliver unambiguous conclusions regarding how electoral politics interfere with economics and I'll briefly mention two of them. A well-known result of this literature is that the size of redistributive programs increases with pretax income inequality. This seems quite intuitive if we consider that the median income is lower than the average income;⁵³ in that case, democracy is a way to express the interest of the middle class personified by the median voter.⁵⁴ About pensions, people's preferences are supposed to be monotonic in age and income, older and poorer voters are always preferring a higher value of pensions; consequently, the model predicts that pensions will redistribute from the rich to the poor (the median voter effect again) and from the young to the aged at the expense of future generations. Connecting this sort of prediction with actual situations proves demanding; we can certainly expect from further research a better consistency between the models and the data.

But a more serious limitation of this approach has a particular significance for this research: political economics build models where agents decide within existing political institutions. Persson and Tabellini, for example, underline that "they refrain from seeking positive explanations for the structure of these institutions." I agree with them that institutions are a product of history and that they are slow to change. The analytical consequence of this restriction is that these interpretations are designed to describe – or recommend – marginal changes within given or between similar political institutions, not to compare significantly different political institutions, which is precisely what is at stake in this paper.⁵⁵ In other words, we are invited here to distinguish carefully between two models, voters deciding a parameter (for redistribution, for pensions...) within a given framework and voters, in some sense in a preexisting situation, de-

⁵²I disagree in this respect with Michael Walzer (1988), who summarizes the welfare state "as a system of nationalized distribution, out of private control and now provided to all," even if this condemnation is pronounced in the name of a highly idealized ambition of personal autonomy and voluntary mobilization, the later proposed as a way "for citizens to control and shape the delivery of welfare services."

⁵³This is the well-known result of Richard Meltzer in 1981.

⁵⁴More precisely, it is interesting here to refer to the comments of Persson and Tabellini, who carefully distinguish this measure of income inequality from other ones; would extreme poverty and extreme wealth coexist, the interest of the middle class would be different from those mentioned above; Persson and Tabellini do not refer to the recent trends in income distribution in the U.S., which could be possibly interpreted that way.

⁵⁵Take pretax income distribution: income inequality (measured by median/average income) is higher in the U.S. than in Europe (section 2); the model we have briefly quoted in the text predicts that redistribution should be higher in the U.S., in opposition to the actual situation. We do not infer that the model is "wrong," we recognize that it is not designed to explain this difference. T. Iversen and D. Soskice (2005) make a good step toward explaining (mainly through proportional representation) the frequently commented on positive correlation between more equal distribution and high levels of redistribution.

ciding what will be the framework for their future choices. This distinction is more than helpful to go a step further in our understanding of how different sort of policies or institutions can reflect different conceptions of fairness.

Preferences are an ambiguous concept insofar as they are conceived as a background for individual rational choice; they have a very different aspect when they are seen as part of a democratic process which does not make choices, but fixes the institutional framework for individual choices. At that stage, we come back to Rawls, according to whom the subject matter of social justice is precisely the basic structure of society understood as the major institutions that “distribute fundamental rights and duties and determine the division of advantages from social cooperation.” By major institutions, he understands “the political constitution and the major economic and social arrangements ... [that] taken together as one scheme ... influence their life prospects [and] what they can expect to be.” In a market economy, consumers express choices in the market place; in a democracy, citizens precisely express judgments about the preferred organization of the economic structure. Politics clearly balances between diverging interests (poor vs. rich) but has a more prominent and exclusive role in solving collective action problems. Individual agents have little control over social norms, social meanings and social roles. When it comes to design and embrace a sense of fairness, they face a collective action problem which is at the roots of democracy.⁵⁶ Political deliberation and decision is the democratic way to deliver a considered judgment about justice; enacting law is the way to make it a social reality. These will be the themes developed in the two following sections.

Collective preferences, as I understand them in the present exercise, finally have nothing to do either with the aggregation of individual preferences or with bargaining in a political arena. Building a social safety net is not a question of altruism but, for everyone, of considered interest. Citizens make judgments not only for themselves but for the entire community. Politics is a place to translate aspirations and principles as well as interests and conflicts into practical arrangements, this is where individual and collective interests mix. As voters, citizens naturally express their own interests but they also express a sense of the public good. In these conditions, a social insurance system appears not only rational but possibly desirable.

As an aside, referring to the veil of ignorance appears here as a suggestive idea. By this, I refer to an initial position where there are known knowns (the high cost of health or education), known unknowns (life expectancy or financial returns) and one major unknown unknown: voters are ignoring how successfully they will perform in the economic game. Endowed with a rational expectations model of the dynamic properties of IT goods, voters could rationally express their preference for institutions which will circumscribe market forces and consequently guarantee a level playing field during their life cycle. I clearly recognize that this is suggestive rather than demonstrative because of the well-known limits of the veil methodology (which in effect were recognized by John Rawls himself). In “Political Liberalism,” John Rawls asserts that it would be a mistake “to suppose that justice as fairness attempts to select principles of justice purely on the basis of a conception of rational choice as understood in economics or decision theory”: there is a question of judgment, not only of rationality. We consequently need to look elsewhere if we

⁵⁶Jon Elster (1989) is an interesting introduction to the difficult questions raised at this intersection of collective action and social norms. It is not surprising that his reflection for this book started from an investigation about the Swedish welfare state.

want to elucidate the origins of different conceptions of the public good. The following section is devoted to a first exploration of this issue.

6. Two Roads to Fairness

Until now, I have argued about the possibility for a nation democratically to prefer subtracting the production and distribution of certain goods heavily loaded with egalitarian concerns to market forces. Does that necessarily mean that societies which circumscribe markets would be more “fair”? Does this imply that the political sphere is more “democratic” than the market? The answer to both questions is no: it all depends on the conception of the public good. Now the fascinating question is: what is the basis for such different collective preferences? Can we really conceive of two widely different and well articulated conceptions of the public good? Here, I need very precisely to distinguish between the empirical and the theoretical aspects of these questions.

I am afraid that empirical observations, even if they are well-inspired and not polemical, do not go very far. It is probably fair to summarize many available descriptions as emphasizing American⁵⁷ as well as European “exceptionalisms.” The huge superstructure of the welfare state in Europe is frequently understood as a product of the increasing influence of social-democratic ideas after World War II, a very special set of circumstances in history. A surprising point here is that conservative parties in Europe – except in the UK under Mrs. Thatcher⁵⁸ – never succeeded and never even really tried to push back the tide of social expenditures and regulations. Europeans’ attitudes clearly seem more deeply rooted than simply in partisan political differences.⁵⁹ By contrast, the narrowness of welfare policy in the U.S. is attributed to a lack of popular support⁶⁰ largely due to specifically American ethnic character.⁶¹ Well, with two exceptionalisms, isn’t one in excess? Anyway, the striking aspect here is not so much the extent of the welfare state as its institutions.

I consequently dismiss the two most frequent views in the public debate: 1) that Europe is the model of a civilized capitalist economy, mixing market efficiency with social considerations to which the U.S. remains strangely hostile; 2) that the U.S. is the model of a market-driven economy, a model that Europe has never been able to adhere to, with dangerous consequences for its future now that globalization forces have been unleashed. Such generalizations are oversimplifications. Looking at America and Europe is not only a question of practical curiosity and media reporting. Could such significantly different preferences have only accidental, circumstantial explanations? This is an invitation to develop a theoretical argument. If you accept the idea that both continents share the same founding values,⁶² could it be that these values are enshrined into two different systemic interpretations?

⁵⁷Louis Hartz (1955) remains a good introduction to the idea that “the American experience is unique.”

⁵⁸For reasons which I will make explicit in another piece.

⁵⁹It has been previously observed that Christian Democratic parties played a prominent role in the conception and implementation of the social state in Europe; if there is any single term to summarize the European way, it is probably “Sozial-Marktwirtschaft,” which was carved out by Ludwig Erhard.

⁶⁰“It didn’t happen there” is the well-known title of Seymour Martin Lipset’s essay to explain “why socialism failed in the U.S.”

⁶¹Martin Gilens (2000).

⁶²They are “the free world,” as recently emphasized by Timothy Garton Ash (2004).

Western culture is based in this regard on the two concepts of Liberty and Equality.⁶³ This really is a big picture, but nations necessarily have their deepest roots in a profound vision of the social good, whatever the difficulties of its implementation. As regards the social fabric, the vision is about justice. Some sort of patriotism *à la Renan*, a shared attraction towards religion can certainly fuel a deep sense of community which can have an effect on equality. Patriotism and religion⁶⁴ certainly have a role, sometimes a major one, but it is difficult to see them as the cement of present modern democracies.⁶⁵ And democracy is precisely the political system in which voters can check the (relative) adequacy between their shared values on the one hand, and individual liberties and government action on the other. Could it be that, growing from the common trunk of western political and moral philosophy, two different articulations of liberty and equality emerge in the modern world? This question cannot be answered in a simple empirical way; what we need to do is to develop two models making explicit the coherence of the whole set of concepts which embodies these basic values.

Gertrud Himmelfarb (2004) recently gave a new and vibrant freshness to the idea of “two different roads to modernity”; this is stimulating reading because the case for this theoretical distinction cannot be made more forcefully, even if, in Ms. Himmelfarb’s expressions, it frequently turns close to the polemical.⁶⁶ I will consequently offer a possibly less subtle but more balanced interpretation. On the one side, we have the great English philosophical tradition; its master words are “natural rights”; there is nothing above individual liberty and property; government is at best an accepted sacrifice. On the other side, there is another great tradition which sees society as predating every interpersonal arrangement; liberties are made possible by the very existence of a social contract; laws which protect property rights and property, which make markets a reality, are the products of government action.⁶⁷

Enlightenment is clearly not a monolith and I will try to summarize these two roads to modernity through a series of alternate concepts which will be introduced after two caveats: 1) I will limit myself to the economic aspect of these differences and make no reference to political rights and concepts; 2) It would be pompous and presumptuous at that stage to make references

⁶³This section owes a lot to Bernard Bailyn (1992), “The Ideological Origins of the American Revolution.” For different reasons, Herbert McClosky and John Zaller (1984), Harold Hyman (1986), and Richard Ellis (1993), as well as Barry Shain (1994), Michael Sandel (1996), and Robert Putnam (2000), helped to frame the historical, sociological and political basis of the abstract ideas audaciously introduced in this section.

⁶⁴The weight of individual, charitable and religious motivations towards welfare in America is an important element in this picture and it deserves a full investigation. Close to economic preoccupations and formulations, K. Scheve and D. Stasavage (2005) argue that religion and welfare spending are substitute mechanisms that insure individuals against adverse life events. In historical and theological terms, it will be interesting to discuss in another piece the different forms of Protestantism that can be distinguished between America and Europe; Methodism, for example, is a very American way of mixing social, spiritual, and ethnical considerations (see R. Richey et alii (1993) without equivalent in the Calvinist/Lutheran European sphere of influence; naturally, this could be interestingly linked to – and distinguished from – the Weberian vision of Protestantism with its emphasis on efficiency considerations. In practical terms, J. Bartkowski and H. Regis (2003) propose an empirical analysis of the implementation of faith-based poverty relief initiatives in the South. See also the reference to R. Fogel in the following footnote.

⁶⁵This could be seen as a secular European view. By contrast, Robert Fogel, the Nobel Prize winner, offers a systematic, and frequently spectacular, vision of the successive religious awakenings in the U.S.; according to Fogel, the present “post-modern egalitarian agenda” is no longer concerned with food or shelter but centered on “a struggle for the distribution of spiritual resources.”

⁶⁶Gertrud Himmelfarb ardently restores “the enlightenment to its progenitor, the British” who are the source of a “compassionate and realistic philosophy” at war with “the French ideology of reason.”

⁶⁷More on this issue in section 7.

to great authors who can inspire this comparison; as an amateur in the field, I modestly propose the following table as a sort of excursion on the “*Philosophenweg*” which mainly summarizes – and hopefully enlightens – the different concepts we have introduced until now (cf. table on the following page).

As a tribute to English philosophy – and to economics – it is interesting to start with utilitarianism which plays such a huge role as a cornerstone of its political tradition ... and which never made such an impression on the continent, where you would find, rather, critical appreciations of the basis and scope of utility. If looking for an alternate concept, you would preferably use capabilities, even if it is a modern invention. It fits rather well with what could be seen as the cornerstone of continental European political philosophy, citizenship, where the individual is not perceived as a utility-measuring atom but as part of a social contract. From there derive two different visions of liberty and cooperation: on the continent, freedom will be associated with a broad interpretation of how the citizen is integrated into the political and social fabric; perfect equality cannot be a reality, but it is an ideal; and liberty for one stops where it impedes other to have equal access to what is considered as part of citizenship. Across the Channel, or the Ocean, you would probably prefer to see the individual endowed with his property – a natural right derived from his labor (or from his sword); freedom is first of all freedom to contract with others in the marketplace, and in any case freedom from the government. Starting from there, the idea of solidarity comes relatively high on the continental road to modernity, the prestige of the entrepreneur – despite the origin of the word – is running much ahead in the American tradition. Attitudes towards risk (or security) are part of the two models, one emphasizing the economic benefits of risk taking, the other the social benefits of equal protection against risk.⁶⁸ Finally, it is more than appropriate to introduce the relation between market and state in a form where the government is part of the problem on the one hand, and where the State is part of the solution on the other.⁶⁹

As I said, this is no more than a modest excursion. I am referring to “models” as economists usually do: a coherent articulation of different pieces which have all their own logic and scope and which fit together because there is a series of well identifiable connections. Introducing fairness considerations in the social fabric finally appears at the roots of two different political economies. Promoting market forces as extensively as possible and correcting their possibly undesirable outcomes through punctual interventions is one solution; the political philosophy which supports this view is a Liberal-market Political-philosophy (LMP-P). Another solution relies on a process where equality concerns call for more universal solutions that invite mixing

⁶⁸The importance of social, cultural, or ethnic factors to explain the extent of redistributive policies has been emphasized in the recent literature, possibly at the expense of this more traditional and more fundamental goal of a safety net taking the form of social insurance; T. Cusack, T. Iversen and P. Rehm (2005) make a strong case for restoring the theoretical and empirical importance of risk in social choices.

⁶⁹Here I try to summarize the rationale of two alternative “models” or *Weltanschauungen*. I am confident that the coherence of the elements is a robust part of the picture. Other aspects of the presentation clearly need more scrutiny. In particular, it could very well be that American and European values (regarding equality) are not so different but that the two continents significantly differ in their appreciation of the role of the government for achieving this goal, so that what could be hastily perceived as major moral differences could come down to a difference in views about what it is legitimate for the state to do. In empirical terms, there is clearly a significant part of truth here; but my presentation suggests that, theoretically speaking, the role of the state should not be considered so independently from the other components, as a *deus ex machina*. Anyway, I agree that more is needed on this point; a step further is offered in section 7 with the introduction of the legal system. I thank Peter Hall for helpful comments on this issue.

market and non-market solutions in a way that allows for the pursuit of democratically recognized goals; the political philosophy which supports circumscribing market forces in that way could be qualified as a Social-market Political-philosophy (SMP-P).

TWO MODELS OF COLLECTIVE PREFERENCES

- | | |
|--------------------|------------------------|
| • UTILITIES | • CAPABILITIES |
| • LIBERTY | • LIBERTY AS |
| • OF CONTRACT | • AN AGENT |
| • PROPERTY | • CITIZENSHIP |
| • ENTREPRENEURSHIP | • SOLIDARITY |
| • REWARD | • EQUAL PROTECTION |
| • RISK TOLERANCE | • AGAINST RISK |
| • GOVERNMENT AS A | • THE STATE AS PART OF |
| • PROBLEM | • THE SOLUTION |

The interesting thing is that neither of these models can be easily qualified as more “fair” or more “democratic” than the other. The only result we can derive from our construction is that extending the sphere of the market as far as possible can be desirable but is not unequivocally desirable, and that this is, in any case, a political choice and not a purely economic issue. I find more it than appropriate at this stage to cite Ronald Dworkin: “the market when it enters enters in a more positive and a more servile way. It enters because it is endorsed by the concept of equality as the best means at least to a point to meet the fundamental requirements [of the society]. . . . But the value of actual market transactions ends just at that point and the market must be abandoned or constrained when analysis shows that it has failed in this task or that an entirely different institutional device would do better.” In that sense, the two preceding sections have successively demonstrated the possibility and the rationality of engaging socioeconomic fairness along two distinct avenues. What remains to be done is to understand if and how these different preferences can actually be implemented.

7. Legal Expression of Different Preferences

If we accept the idea of two broad and different conceptions of social justice inspiring modern market-based democracies, the next question is: how could these preferences be implemented? Actual institutions like a social safety net are so far away from philosophical prescrip-

tions that we cannot expect any easy connection to actual social choices.⁷⁰ But a second look could deliver a less pessimistic assessment: it could very well be that the distance between these two spheres is smaller than is usually perceived. Actually, there is a natural bridge between a nation's deepest aspirations as a community and its day-to-day operations as a myriad of agents: this bridge is the legal system. The legal system keeps the highest values of a nation enshrined in its Constitution; and the judiciary is the link between these principles and the complex practicalities of day-to-day economics. Could different legal systems both express and empower Collective Preferences as previously defined?⁷¹ This is what I want now to explore briefly.

This connection clearly is anything but new: in recent years, part of it has been carefully and extensively explored by the "Law and economics" program. Asserting the primacy of efficiency over distribution in analyzing private law is the more recognizable emphasis of "Law and economics,"⁷² treating the impact of legal rules as incentive mechanisms its main tool,⁷³ and promoting the inviolability of individuals' economic rights its major normative position. In that sense, Law and economics seems perfectly fitted with the left column of the previous table, LMP-P. Without entering into a detailed argument, this is brilliantly and powerfully demonstrated, among others, by Richard Epstein⁷⁴ in his analysis of private property, or by Richard Posner, whose wealth maximization approach "allows a reconciliation among utility, liberty and even equality as competing ethical principles, an approach – Posner specifies – which seems to have played an important role in the growth of the common law."⁷⁵

This movement has recently grown as a dominant force in legal academia in the U.S. Its affirmation of novelty is methodologically visible in many aspects; but it is doubtful that it would have no precedent at all. The strong relationship between law and economics had had a first expression with the Realist school heralded by Robert Hale.⁷⁶ Legal realism, as well as institutional economics, was born from a reaction against *laissez-faire*.⁷⁷ Following Barbara Fried, the Realists' main achievement was to "debunk the notion of a free-standing, self-regulating market by showing that the market was ineluctably constituted by the legal regime in which it operated." The roots of this Realist critique are to be found in the two pillars of *laissez-faire* constitutionalism (from the late nineteenth century until the 1930s) with its insistence on

⁷⁰Political philosophers are well aware of this distance and generally prefer not to engage in practical debates; a worthwhile exception is Philippe van Parijs (2005) offering a strong argument in favor of the "universal allocation."

⁷¹The analysis of "Legal Origins" offered by E. Glaeser and A. Shleifer (2001) very much stimulated this part of the research.

⁷²In terms of international comparisons, the economic analysis of law stimulated a vast research program which ultimately found its way to the well known World Bank Reports, "Doing Business." The Reports rightly emphasize the importance of appropriate institutions for sustaining successful development; they have been severely criticized for methodological weaknesses regarding the data, as well as the implicit model which unfairly denigrates civil law; see G. Canivet and M.A. Frison-Roche (2005).

⁷³Viewed from the economic side of the world, it is certainly a good point. But legal rules in fact provide more than incentives: they express preferences and they change people in a continuous process of retroaction; see C. Sunstein (1997).

⁷⁴In his analysis of the Takings clause of the U.S. Constitution.

⁷⁵Richard Posner (1981), p. 115.

⁷⁶Barbara Fried (1998); I also refer in this paragraph to Cass Sunstein (2004). Fried describes R. Hale as "the head of the first law and economics movement."

⁷⁷Robert Hale began his academic life as an economist and is said by Barbara Fried to have kept strong ties to institutional economists as T. Veblen or J. M. Clark (p. 10).

freedom to contract (as an expression of individual liberty) and private property.⁷⁸ But it would be a mistake to read the Realists' work only as of historical interest. They were preoccupied, as we are, by the appropriate limits of individual rights in a market-based democracy. The movement in that sense not only remains a trenchant rejoinder to some of the most reductive attacks on the moral legitimacy of the welfare state,⁷⁹ it brings a well articulated support to the idea that, in modern economies, a fundamental part of people's rights can only be granted under the protection of the state.⁸⁰

Now, what do modern constitutions say and what does the comparison between Europe and the U.S. suggest in this regard?⁸¹ There is a growing literature focusing on the economic aspects of constitutions; the majority perspective among economists tries to understand the emergence of successful constitutions delivering both human rights for citizens and an appropriate framework for market forces⁸² or, at a more advanced stage of economic development, to establish causal relations between specific aspects of the constitutions and policy outcomes.⁸³ The central role of the Constitution is, for example, well recognized by Alesina and Glaeser in their study of American and European redistributive policies. Their attention is mainly focused on the U.S. Constitution; extending their remarks to a comparison with Europe is what I want to explore now.

A striking aspect of modern constitutions is the addition of one formulation or another of social goals or "positive rights" to the traditional negative ones.⁸⁴ This is a striking difference between European constitutions and the American one, which is lacking similar formulations.⁸⁵ The present constitutions of France and Germany for example – but the same could be said of

⁷⁸The "famous (or infamous)" 1905 Supreme Court's decision in *Lochner vs. New York* is the most extensively commented point in this field; I refer to R. Dworkin (p. 179), B. Fried (p. 32), C. Fried (p. 174), P. Irons (chap. 20).

⁷⁹Cass Sunstein quotes Robert Hale as saying that "property rights are in effect a delegation of public power" (p. 23), a position which he interestingly enough traces back to J. Bentham himself.

⁸⁰"The victory of the central government, the creation of a central government was a haven of refuge to the individual"; this is no expression of a classical French statist view but of Franklin D. Roosevelt, cited by Cass Sunstein from an extraordinary speech delivered in San Francisco (1932).

⁸¹There is no better introduction here than Frank Michelman (2005a) who discusses different aspects of the idea that different constitutional devices in Europe and the U.S. express or could express significant ideological divides; he rightly points out that the deciding fact should be to check the effectiveness of these devices to constrain public actors to desired levels of performance. The present reflection precisely tries to introduce explicitly this desired level of "performance" in the argument.

⁸²D. Acemoglu and J. Robinson (2005).

⁸³T. Perrson and G. Tabellini (2005).

⁸⁴Following World War II, a large international consensus finally summarized these principles in the Universal Declaration of Human Rights, of which one aspect deserves particular attention at that stage: without underestimating the role of many actors, such as Charles Malik in particular, it is worthwhile to underline the Franco-American influence through the continuously prominent roles of Eleanor Roosevelt and René Cassin. See M. A. Glendon (2001) and E. Pateyron (1998) for two slightly different restitutions of this important step towards a new world era (and notice their appreciations of the respective roles played by Eleanor Roosevelt and René Cassin).

⁸⁵Frank Michelman (2005b) emphasizes that the American legal system "had ripened to maturity over a period running through the mid-twentieth century." Following Cass Sunstein (2004), it is more than conceivable that this maturity could have developed in a "second bill of rights." On the other hand, A. E. Dick Howard (1990) presents evidence that, even if in the second part of the twentieth century, precisely when the Supreme Court had been bolder in using its power of judicial review to bolster individual rights, it has done so mainly through decisions which lie within the tradition of limiting the government's power over individuals.

many others, like Spain or even of “new European” countries like the Czech Republic – define the Republic as “democratic and social.” The exact references are the following:⁸⁶

France, preamble: The French People solemnly proclaims its fidelity to the *Droits de l’homme* as defined by the 1789 Declaration, confirmed and completed by the preamble of the Constitution of 1946. . . . article 2: France is an indivisible, secular, democratic and social Republic.

Germany, article 20: The Federal Republic of Germany is a democratic and social federal state... article 23: With a view to establishing a united Europe, the Federal Republic of Germany participates in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity.

Lawyers are understandably uncomfortable with “social rights” for different reasons: a comparison with negative rights is useful to discard two frequent interpretations and put the question of positive rights on a more robust stage.⁸⁷ I shall make three successive points:

- First, the most frequently mentioned difference is that human rights (freedom of conscience, freedom of speech ...) seem nothing less than natural rights in our modern democracies, while social rights would be of a more political – implicitly more debatable not to say partisan – nature. There is an element of truth here, but not much: everywhere, including Britain and America, the fundamental rights of the human person have been the product of a long intellectual elaboration (the enlightenment again) and of an insurrection against prevailing established powers⁸⁸ under which, be it the Church or the Prince, the sole individual right was submission. This first expression of a major difference thus proves fundamentally deceitful: recognizing social rights in principle is no more “political” than asserting fundamental rights only because the latest are profoundly political ones.

- A second difference allows some progress but leaves the comparison still unsatisfying. Negative rights are said to be directly enforceable, social rights not so. There is also an element of truth. Rights are definitely not aspirations. Citizens are entitled to expect that independent judges will ensure that their recognized rights are actually protected against the power of the government (U.S. Constitution). How could you imagine that, whatever the general social right, the right to decent housing, for example, could be brought to a court? There is a point here: if (a big “if,” as we shall see), if enforcement of rights is identified with the work of the courts, it might justify not including such rights in a Constitution which is a legal document.

- A third difference will finally prove more useful. The proper recognition and definition of both categories of rights do not encounter similar conceptual and political difficulties.⁸⁹ Briefly said, human rights proved recognizable simply by being qualified (freedom of speech); they

⁸⁶Completing footnote 81, it is interesting to quote the corresponding article of the Universal Declaration (article 22): “Everyone, as a member of a society, has the right to social security and is entitled, ... in accordance with the organization and resources of each state, to the realization of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

⁸⁷The following paragraphs would clearly be enriched by better integrating legal reasoning as developed by Frank Michelman (2003b).

⁸⁸An interesting chapter of B. Bailyn (1992) is entitled “The Logic of Rebellion.”

⁸⁹This explains the “element of truth” I have just mentioned in the two previous paragraphs.

subsequently have to be introduced as such in the law of the land; naturally, the formulation will prove ambiguous in practical situations; it will precisely be thereafter to the courts to specify and protect them in particular cases.⁹⁰ In summary, there is an immediate congruence between the political philosophy which inspires these rights and the legal system which, in a democracy, is their natural protector. The same cannot be said of social rights. This difference in nature invites us to enrich our understanding of how social rights are recognized, defined and finally enforced.

The fundamental difficulty raised by introducing social rights can spectacularly be made visible through two unexpectedly similar references by Maximilien Robespierre and Franklin D. Roosevelt. Robespierre, in 1793, asserted that the revolution's goal was to promote two fundamental rights: "liberty and the means simply to exist"; Roosevelt, in his 1936 acceptance speech in Philadelphia,⁹¹ famously quoted an old English judge ("necessitous men are not free men") before promising to defend freedom and "the right to live." This common reference to the "right to live" in the mouths of both the French revolutionary and the American president is a fascinating starting point to elucidate the political construction which leads to the recognition of social rights.

What does it imply for a nation to be organized in order to allow everyone to "live out of necessity"? There is clearly a difference of nature with the enforcement of "freedom of speech."⁹² I see three major steps to implementing any conception of "freedom from want" – which we suppose for simplicity to have already gained a philosophical (or political or religious or whatever) expression:

- First, there is a democratic test: this particular conception needs to gather sufficient momentum to be supported by a majority;
- Second, there is a legal test: those rights have to be expressed, enacted and implemented in appropriate institutional and legal terms;
- Third, there is an economic test: those rights have to prove compatible with the requirements of a market economy.

When these conditions are fulfilled, the conclusion appears quite clear: rights are not expressed in purely legal terms; their enforcement is not only the judiciary's job; the relationship between law and politics can work in different ways.

The U.S. Supreme Court is an extremely interesting body in this regard, both the highest level of the judiciary and sort of a political body.⁹³ By this, I mean that it makes decisions about issues which in every other democracy would be in the hands of elected representatives: civil rights, abortion, or, for our purposes, social legislation. And the Constitution seemingly proved flexible enough to cut the political debate in one sense, or, in another time, in the opposite, just as you expect partisan majorities to do. The result is an extraordinary historical course where the

⁹⁰I refer to Ch. Fried, chapter 4: "Speech," where the foundations of freedom of speech are laid, the principle being afterwards put within a broader doctrine and finally applied to the evaluation of practical cases: defamation, sex, flag burning...

⁹¹<http://www.cfinst.org/eguide/PartyConventions/speeches/1936d.html>

⁹²By that, I mean that there is no direct congruence (as previously analyzed regarding freedom of speech) between the political philosophy which inspires such a view and the political, institutional or legal means of implementing it.

⁹³D. O'Brien (1990) even describes the Court as a "fundamentally political institution."

Court proved frequently on the liberty side of the western equation rather than on the equality side (the already mentioned *Lochner* Court). True enough, that did not forbid decisions moving the U.S. in the welfarist direction in the New Deal area and in other aspects after World War II;⁹⁴ does that mean, as Cass Sunstein eloquently suggests, that “a second bill of rights” was (or still could be) in the making?

The most interesting point in this regard is the power associated with this political role: the power to apply a negative conception of rights is, almost by definition, a negative power. Regarding the wide range of issues related to social rights, the Justices can give way to political decisions or kill them; they cannot promote those rights and they have no budget competence eventually to back them. Europeans expect laws, not courts, and representatives, not judges, to enforce positive rights. Have a brief look to the “right to health” in European countries.⁹⁵ How did this extremely vague notion come into the institutional and legal reality whose results were described in section 2? The three criteria I have previously introduced help understand the rationale behind the historical and political process (the path dependence story): following decades of political debates, citizens came to a relatively clear understanding of what this right is about and assumed that it would not be best served by market forces; voters democratically expressed such preferences and politicians enacted laws to circumscribe the market in this particular sphere. Finally, the test for sustainability, in this model, is that the political process delivers positive results in the three above described dimensions: the distribution and financing of health services are considered as fair; the democratic machinery insures accountability and adaptation; the production side is efficiently connected to the rest of the economy.⁹⁶

What makes a high level of “redistribution” sustainable in Europe finally could very well be due to the fact that it precisely takes a different avenue than redistribution. It is likely that European social states would not be what they are if their tax logic really were what economic textbooks describe: “tax the rich and give to the poor.” The implicit consequence is that the generous welfare state is legitimate and sustainable because it is grounded in a set of insurance institutions; this is both an expression of and a limit to its redistributive character. This could be seen as a paradox. But the paradox goes further and the idea that insiders in Europe fight to maintain their privileges, which is possibly right in some quarters of the economy, is definitely wrong as a general description of the system; even if redistribution is not its explicit goal, fair institutions prove, as the data clearly demonstrate, a far better way for promoting a fair production and distribution of IT goods and consequently for keeping inequalities under control.

⁹⁴I refer to Peter Iron’s chapters 23 and 24 and to Cass Sunstein, chapters 8 (“America’s pragmatic constitution”) and 9 (“How the Supreme Court [almost] quietly adopted the second bill”).

⁹⁵As stated in France in the preamble to the 1946 Constitution, which is part of what the Constitutional Court relies on to make its decisions and calls the “block of constitutionality.” In Germany, statutory health insurance is provided under the Gesetzliche Krankenversicherung (GKV) initiated in 1883 and progressively extended to nearly everyone.

⁹⁶By that, I mean that research, management, wages, division of labor, productivity ... are determined in line with standard business practices in the economy. As we described in section 2, these economic elements are summarized in the premium paid by socially insured agents to cover these costs. Remember at that stage that the cost-benefit analysis of health care is in favor of the European organization.

Conclusion

For two hundred years, the gains from trade made possible by increasing specialization and division of labor have been the cornerstone of economic theory; increased productivity and higher levels of consumption have been the rewards of this long-term confidence in market efficiency. And those economies which did not trust this role paid – and continue to pay – a really high price. But the long line of economists who built this approach into an elegant body of economic theory possibly did so without sufficient regard for the consequences this exchange process could have when broadly considering human affairs. Choices made in the market place do not cover every aspect of life. Introducing collective preferences has deep implications when balancing efficiency and fairness considerations.

I have emphasized the inter-temporal properties of those goods with which the welfare state is most concerned. By comparison with other goods, like airlines or telecommunications, economics recognizes the many difficulties which in those activities affect both behaviors and market adjustments. Economics consequently has less powerful arguments to justify its usual conclusion that market forces are the engine of optimal social results. Inter-temporal goods also strongly retroact on equality. Modern political philosophy invites considering both efficiency and fairness considerations in the production and distribution of those goods. These two arguments set the stage for the possibility of different preferences regarding the way market and non-market solutions coexist in a market-based democracy. In effect, we found in the western tradition two deeply rooted visions of the Liberty/Equality couple, which can be formulated in two different political philosophies and finally be reflected in two different legal systems.

It is clear that many of those remarks are tentative or suggestive rather than demonstrative. A lot of work remains to be done in many directions. The actual comparison between the two continents is in itself a life-long adventure. The economic argument regarding insurance as opposed to redistribution has to be both extended and refined. Normative theories of justice have been introduced in a way which will appear excessively audacious to many. The distinction between two roads to fairness proved suggestive but really is a first and feeble approximation of what the idea could deliver. And finally, the development of a vision completing the “Law and economics” approach, which proved so successful in recent years, is a promising perspective of which I only offered a first sketch. All this is a research program rather than a working paper. But to fruitfully explore these different aspects, it was a prerequisite to have a robust starting point. The conclusion at that stage is in line with the title of the paper: efficiency and fairness considerations can mix in different, well-identified, and sensible ways. Market forces do not condemn fair institutions..

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